

Court of Appeals No. 44153-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

JASON WILLIAMS,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 11-1-03966-0
The Honorable Kathryn Nelson, Presiding Judge

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I. ASSIGNMENT OF ERROR

Mr. Williams was denied a fair trial.

II. ISSUES PRESENTED

1. Did prosecutorial misconduct deprive Mr. Williams of a fair trial where the prosecutor argued that the jury could infer Mr. Williams' guilt from his silence?
2. Did ineffective assistance of counsel deprive Mr. Williams of a fair trial where his trial counsel failed to object to the prosecutor's improper closing argument?

III. STATEMENT OF THE CASE

A. Factual Background

On September 23, 2011, Lakewood Police Officer Oscar Maysonet was dispatched to an apartment complex in Lakewood regarding a theft of a motorcycle. RP 110. Officer Maysonet contacted the victim of the theft, Mr. Jones, in the parking lot of the complex. RP 110. Officer Maysonet obtained Mr. Jones' information and information about the motorcycle, and he submitted the information to LESA records. RP 111-113. Mr. Jones described the motorcycle as a blue and white Yamaha and he still had the keys for the motorcycle. RP 113-114. Mr. Jones indicated that the motorcycle had been taken some time between September 20th and September 23rd and that he had no idea who took it. RP 115. At the time the motorcycle was taken, Mr. Jones' motorcycle was "in perfect condition." Plaintiff's Exhibit 2, 7:52-8:01.¹

¹ A video deposition of Mr. Jones was taken on August 14, 2012. Plaintiff's Exhibit 2, 0:00-0:17. This video was admitted as Plaintiff's Exhibit 2 played to the jury in lieu of Mr. Jones' live testimony. RP 120. However, the audio of this video was not transcribed.

On September 27, 2011, Pierce County Sheriff's Deputy Michael Csapo was driving when he observed a motorcycle speeding and weaving in and out of cars. RP 43-44, 85-86. Deputy Csapo activated the lights on his vehicle and pulled the motorcycle over. RP 46, 87.

Deputy Csapo observed that the tabs on the motorcycle were expired. RP 49. Deputy Csapo contacted the driver of the motorcycle, obtained the driver's ID, and determined that the driver of the motorcycle was Mr. Jason Williams. RP 47-48, 88. Deputy Csapo asked Mr. Williams for the registration of the motorcycle but Mr. Williams did not have one. RP 48. Deputy Csapo asked Mr. Williams about the expired tabs and Mr. Williams indicated that he knew nothing about the tabs. RP 49, 91-92. Deputy Csapo returned to his vehicle to check Mr. Williams' records and to call for backup. RP 48, 92-93. Deputy Greiman responded to the scene in a matter of minutes. RP 48-49.

At some point, Deputy Csapo noticed that the ignition on the motorcycle was missing. RP 50, 92. Deputy Csapo also determined that the license plate on the motorcycle did not match the motorcycle. RP 50. The motorcycle Mr. Williams was riding was blue Yamaha but the plate was issued to a gold Suzuki motorcycle. RP 89-91.

After Deputy Greiman arrived, Deputy Csapo recontacted Mr. Williams. RP 50. Deputy Csapo and Deputy Greiman arrested Mr. Csapo and put him in the back of

Reference to Mr. Jones' testimony will be made by giving the time during the video at which Mr. Jones gives the testimony being referenced.

Deputy Csapo's patrol car. RP 50, 94. The deputies then obtained the motorcycle's VIN number and verified that it had been stolen. RP 50, 93-94.

Deputy Csapo told Mr. Williams he was being detained for investigation of a stolen vehicle and read him his Constitutional rights. RP 50-51, 94. Mr. Williams said he understood his rights and would talk to the deputies. RP 52-53. Deputy Csapo asked Mr. Williams where he had gotten the motorcycle and Mr. Williams responded that he had gotten it from a friend. RP 49-50, 53-54, 94-95. Mr. Williams did not provide the deputies with any paperwork regarding the motorcycle. RP 95. Mr. Williams also did not give Deputy Csapo the name, contact information, or address of the friend from whom he had obtained the motorcycle. RP 95. Mr. Williams did not have the keys to the motorcycle. RP 95.

Deputy Csapo determined that the registered owner of the motorcycle was Morgan Jones. RP 99. Deputy Csapo noted that the motorcycle "did not appear to be well kept." RP 92. At the time the motorcycle was recovered, it appeared to have been crashed at least twice, every piece of plastic on it had been cracked, the exhaust pipe had been stripped off, the license plate had been stripped off, the ignition was completely destroyed, plastic pieces were missing, the foot pegs were missing, the front fender was broken as if the motorcycle had collided with something head on, there were scrapes on both sides, and it was "in really bad shape." Plaintiff's Exhibit 2, 13:21-15:17.

B. Procedural Background

On September 28, 2011, Mr. Williams was charged with unlawful possession of a stolen vehicle in violation of RCW 9A.56.068 and 9A.56.140. CP 1.

On October 25, 2012, Mr. Williams stipulated to the admissibility of the video deposition of Mr. Jones. RP 20; CP 47-48.

On October 29, 2012, a 3.5 hearing was held to determine the admissibility of Mr. Williams' statements to the police. RP 42-62. Mr. Williams had no objection to the admissibility of his statements to police. RP 67.

Mr. Williams' trial also began on October 29, 2012. RP 83.

Dale Jesse Wilson and his father, Dale John Wilson, both testified on Mr. Williams' behalf. They testified that they accompanied Mr. Williams when he purchased a blue motorcycle off of Craigslist about a year before the trial. RP 122-134.

The jury found Mr. Williams guilty. RP 174; CP 49.

On November 2, 2012, Mr. Williams stipulated to the existence and comparability of two prior out-of-state convictions. RP 183; CP 52-53.

Notice of Appeal was also filed on November 2, 2012. CP 66.

IV. ARGUMENT

1. Mr. Williams' right to a fair trial was violated by the prosecutor arguing that the jury could use Mr. Williams' silence to infer his guilt.

"No state shall...deprive any person of...liberty[] or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* Wn. Const. art. I, § 3, "No person shall be deprived of life, liberty, or property, without due process of law."

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor's conduct was improper and the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). A defendant must show that the conduct of the prosecutor had a substantial likelihood of affecting the verdict. *Brett*, 126 Wn.2d at 175, 892 P.2d 29.

- a. The prosecutor's closing argument regarding Mr. Williams' silence about who he bought the motorcycle from was improper.*

Mr. Williams was charged with unlawful possession of a stolen vehicle in violation of RCW 9A.56.068 and RCW 9A.56.140. CP 1. Under RCW 9A.56.068(1), "a person is guilty of possession of a stolen vehicle if he...[possesses] a stolen motor vehicle." Under RCW 9A.56.140(1), "'Possessing stolen property' means knowingly to...possess...stolen property knowing that it has been stolen."

It was not disputed that Mr. Jones' motorcycle had been stolen or that Mr. Williams possessed Mr. Jones' motorcycle. The sole issue for the jury to resolve was whether or not Mr. Williams knew the motorcycle he possessed was stolen. RP 147-151, 161. The State framed the issue to the jury as the jury had to determine if Mr. Williams was "aware of" the fact that the motorcycle was stolen. RP 151.

The State argued to the jury that the jury could find Mr. Williams knew the motorcycle was stolen due to the condition of the motorcycle:

There were a lot of things about that motorcycle that would absolutely indicate to anyone that came at it that it was stolen. A big gaping hole where clearly the ignition should have been, no key to that motorcycle, no registration, and no title. You could tell the true nature of that motorcycle and the fact that it was stolen by looking at it.

RP 161.

Counsel for Mr. Williams argued to the jury that “the true nature of [an] object is not something that you can tell just by looking at it” and that given the overall condition of the motorcycle it was not unreasonable for Mr. Williams to not be surprised that the motorcycle did not have an ignition switch and to not assume the motorcycle was stolen just because the ignition switch was not present. RP 156-159.

In its rebuttal argument, the State used the facts that Mr. Williams did not provide the police with the name, address, or phone number of the person he bought the motorcycle from to the police as evidence from which the jury could infer that he knew the motorcycle was stolen:

When Deputy Csapo asked the defendant about the motorcycle, he didn’t tell Deputy Csapo that he had purchased it off of Craigslist. He told Deputy Csapo that he had gotten it from a friend. If he had gotten it from a friend, you know he would have had a name. You know he would have had a way of contacting that person, or at least you can infer it. He refused to give that information to Deputy Csapo. Not even a name.

RP 163.

The State's argument to the jury is clearly an argument that the jury could use Mr. Williams' silence about the name of the person he purchased the motorcycle from to infer Mr. Williams' guilt. However, the State may not make closing arguments "relating to a defendant's silence to infer guilt from such silence." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). An improper comment on silence occurs "when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

The State's argument was improper since it unequivocally urged the jury to infer Mr. Williams' guilt from his silence while being questioned by Deputy Csapo.

b. The prosecutor's improper argument had a prejudicial effect and likely affected the verdict.

The condition of the motorcycle supported both innocent and incriminating inferences regarding Mr. Williams' knowledge of whether or not the motorcycle was stolen: the jury could have inferred as the State argued that the condition of the motorcycle clearly indicated it had been stolen, or the jury could have inferred that Mr. Williams purchased a used motorcycle off of Craigslist complete with damage caused by events unknown to Mr. Williams.

The State's improper argument that the jury could infer Mr. Williams' guilt from his post arrest silence had a prejudicial effect because the jury was told it could find Mr. Williams guilty on an impermissible basis. As stated above, the key issue for the jury was determining whether or not Mr. Williams knew the motorcycle was stolen. The State

presented only the circumstantial evidence of the condition of the motorcycle to support its assertion that Mr. Williams knew the motorcycle was stolen. However, this evidence was ambiguous and supported equally logical and credible inferences that Mr. Williams should have known from the condition of the bike that it was stolen or that he was purchasing a well-used motorcycle off of Craigslist.

The State's improper argument that the jury could use Mr. Williams' silence to infer his guilt gave the jury an improper analysis of the evidence before it upon which to make a finding of guilt. This had a prejudicial effect to Mr. Williams since the jury ultimately found Mr. Williams guilty and the State's evidence was much weaker without the improper inference that Mr. Williams was guilty because he did not tell Deputy Csapo the name and address of the person he purchased the motorcycle from.

The prosecutor committed misconduct in arguing that the jury could infer Mr. Williams' guilt from his silence regarding the person who sold him the motorcycle. This improper argument deprived Mr. Williams of a fair trial.

c. The prosecutor's improper argument was flagrant and ill intentioned and no curative instruction could have cured the prejudice cause by it.

Without a timely objection, reversal for prosecutorial misconduct is only required if the conduct is so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative jury instruction. *State v.*

Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008), *cert. denied Warren v. Washington*, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

Trial counsel for Mr. Williams did not object to the prosecutor's improper argument that the jury could infer Mr. Williams' guilty from his silence. However, as discussed above, this improper State's argument by the State was the "tie-breaker" regarding the inferences of guilt to be drawn from the circumstantial evidence provided by the State. In such a situation, even if the court had instructed the jury not to engage in the logic suggested by the State, such an instruction would have been meaningless since the argument had already been suggested to the jury, and the jury could not help but at least consider the State's improper logic.

As the United States Supreme Court has written and the Washington Supreme Court has concurred, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction." *State v. Newton*, 109 Wn.2d 69, 74 n.2, 743 P.2d 254 (1987), *citing Krulwich v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949). No limiting instruction in this case would have removed from the minds of the jurors the State's argument that Mr. Williams was guilty because he would not tell Deputy Csapo the name of the person he purchased the motorcycle from.

2. **Mr. Williams received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's improper closing argument.**

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480, *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

The purpose of the effective assistance of counsel guarantee of the Sixth Amendment is to ensure that a criminal defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-226, 7453 P.2d 816 (1987) (applying the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984))).

There is a strong presumption that defense counsel’s conduct is not deficient, however, there is a sufficient basis to rebut such a presumption where there is no

conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2005).

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

As discussed in section 1 above, the prosecutor made improper argument during closing argument. Mr. Williams' trial counsel failed to object to this argument. It was not objectively reasonable, nor can it be considered legitimate trial strategy for Mr. Williams' trial counsel to fail to object to the prosecutor's improper closing argument. Mr. Williams received ineffective assistance of counsel and this court should vacate Mr. Williams' conviction and remand his case for a new trial.

VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. Williams' conviction and remand his case for a new trial.

DATED this 24th day of April, 2013.

Respectfully submitted,

/s/

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on April 24, 2013, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us Tacoma, Washington 98402, and by United States Mail to Jason D. Williams, 214 South 70th Street, Tacoma, Washington 98408, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on April 24, 2013.

/s/
Norma Kinter

ARNOLD LAW OFFICE

April 24, 2013 - 3:13 PM

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